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# Ceilings, Costs, and Compulsion In Auto Compensation Legislation

Walter J. Blum\* and Harry Kalven, Jr.\*\*

The recent and quite spectacular development of statutory plans for handling auto accident compensation provide, at this moment in their unfolding, an invitation to analysis.<sup>1</sup>

In an awesomely short time period for a major legal change — less than a decade — the idea of no-fault compensation has moved through several phases.<sup>2</sup> The contemporary momentum began with a fully developed legislative proposal in the Keeton-O'Connell Plan; then passed through five years of lively and often bitter debate about *that* Plan by the bar and the insurance industry; then saw actual adoption of a plan in Massachusetts, followed by a flood of bills and statutes touching almost every state in the country. The change has not yet run its course, but surely it already provides more than enough phenomena to work over.<sup>3</sup>

Even on the surface there are facts that are arresting. The Keeton-O'Connell Plan was for several years the salient point for debate and the only plan under serious discussion. It was carefully elaborated in a thoughtful book-length study; yet when the time came for action, Massachusetts did not adopt it, nor has any state since. The Keeton-O'Connell Plan has not provided the baseline from which other plans have been developed. It is not too much to say that, however large the debt so deservedly owed to it, the Keeton-O'Connell Plan has virtually dropped out of the discussion

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<sup>1</sup> This Article as an effort to analyze certain points in what might be thought of as theory underlying auto accident compensation legislation. We have placed the discussion at a level of generality which makes it appropriate not to cite particular statutory provisions, not to supply full technical details on issues, and not to cover systematically all important issues raised by plans. Omitted, for example, are the treatment of intra-state problems, the decision whether insurance follows the car or follows the family, the prescription for subrogation and reimbursement, and the handling of death reparations. The literature is now voluminous and accessible and we have thought it unnecessary to add bibliographical references.

<sup>2</sup> This is the fourth time within the decade that we have written on the topic. We began in 1964, prior to the publication of the Keeton-O'Connell proposal, with *Public Law Perspectives on a Private Law Problem*. This was an effort to examine the choice between the common law on the one hand and auto plans viewed as extensions of "liability" on the other. At that time, we thought the central issue was, stated simply, who is to pay the cost of covering the victims not covered by the common law liability system. In 1967, in *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239, our concern was with deterrence. Assuming that issues of allocating accident costs could be translated into strategies for deterrence in order to optimize accident costs, we explored whether a plan would be superior in this respect to the common law. In 1968, in *A Stopgap Plan for Compensating Auto Accident Victims*, 1968 INS. L.J. 661, the concern was once again with costs, this time re-examined in the light of expected economies in administering reparations under a plan.

The topic has had a stubborn attraction for us, and we have thus far been unable to exhaust its challenges to analysis.

<sup>3</sup> At present there are nineteen or twenty states which have enacted some sort of plan; there are in addition several proposals for federal legislation and the important model act of the Commissioners of Uniform Laws.

altogether.<sup>4</sup> That Plan has been succeeded by an astonishing variety of proposals differing both in structure and detail. Whatever consensus there is behind the impetus for changing tort law in auto accident cases, there is yet to emerge any agreement on a model.

The actual passage of a statute in Massachusetts in 1970 was indisputably the great catalyzing event. While many in Massachusetts and other states have pronounced the experiment successful and have found that success persuasive, no statute elsewhere, and no proposal, has yet selected the Massachusetts statute as the model. A close look at the record suggests that if indeed the Massachusetts plan has been a success, it may have been on grounds different from those that led to its formulation; and in any event the factors that caused the success are today a mystery which remains to be cleared up.<sup>5</sup>

## 1

There is undoubtedly a rich component of realpolitik in much that has happened. One source of pressure came from consumerism. Advocates of greater government protection for consumers saw in the auto accident phenomena an inviting arena. They argued from the familiar perspective that the consumer was not getting enough for his money and that government should intervene to see that he did. The focus was therefore on what you received when you bought auto insurance; the complaints were analogous to those that would arise if one bought an overpriced television set or, better, an overpriced automobile. It is likely that Ralph Nader, although only tangentially involved, added significantly to the momentum and popularity of the no-fault movement.

Another and perhaps decisive source of momentum came from segments of the insurance industry. For decades the industry had formed a monolithic lobby in opposition to compulsory liability insurance — an ever present threat of government intervention which fell far short, it might be

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<sup>4</sup> This is not to suggest that Professors Keeton and O'Connell have dropped out of the discussion. To the benefit of all, they have continued as leading participants in this arena.

<sup>5</sup> There are at least two oddities about the experience in Massachusetts. Introduction of the plan was accompanied by an inexplicable and unanticipated reduction in the number of auto accidents. It was also accompanied by a sharp decline in the ratio of claims to accidents. Together these factors in large part produced the reduction in total pay-out to victims, which in turn produced the widely advertised reduction in premium costs to motorists. These matters are traced in Brainard, *The Impact of No-Fault on the Underwriting Results of Massachusetts Insurers*, 44 Miss. L.J. 174 (1973).

It is apparent that there is a puzzle in telling whether or not a plan is a success, once it has been placed into operation. What should be the criteria against which the actual performance of a plan is to be measured? The dominant criterion in making judgments about the Massachusetts experience seems to be that average premium costs to motorists for personal injury coverage went down dramatically. Other factors surely are relevant; among them are: What is the amount of reparations the average victim receives? What is the full cost of delivering a dollar of reparations? What part of the total economic loss is left uncovered?

In any event, the legislative momentum today is strong enough that the consensus for adopting a plan does not rest crucially on the experience in Massachusetts, or for that matter, on the experience in any other state.

noted, of an auto compensation plan. Suddenly the industry ceased to act with a common front. Some companies saw the chance to get a greater share of the market because they were already organized to sell first-party accident insurance. Other companies at first opposed plans, but ultimately resorted, as a defensive tactic, to making their own proposals in order to preserve their marketing position.

A third special interest group was the personal injury bar. Over time it had developed the handling of personal injury claims into an impressive speciality which, though the vast majority of cases were settled, depended upon skill in trial work. Inevitably the trial bar perceived that plans aimed at reducing personal injury trials must unsettle drastically the expectations and habits that had been accumulated. Indeed, enthusiasts for plans pointed out that lawyers were a chief expense of the current system. The trial bar and part of the insurance industry became natural allies in opposition to plans, and both adopted the tactic of making counter proposals for reform that advisedly were half-way measures. They closed ranks with a special vigor to exclude the federal government.

Looking back over the recent course of events, one is struck by the degree to which the persuasiveness of the bar on this policy issue was reduced. In the popular political debate the issues were somehow never perceived as tort problems which invited the seasoned competence of lawyers. And when the insurance industry finally shifted to support compensation plans, the trial bar was left stranded in the awkward position of being virtually the only unfriendly voice and of appearing to speak only in defense of its fees.

An informed and realistic history of these pressures and tactics underlying the no-fault movement could yield rich insights into the nature of political-legal change in America and would be a fascinating item to explore. But these are points for another day.

## 2

A threshold business is to identify the referent when discussion turns to no-fault plans. It has not been fashionable to propose definitions, yet there is an undeniable sense that for the most part people have not been talking past each other, and the lack of definition certainly has not inhibited discussion. Occasionally in argument someone will say that a given proposal is not "true no-fault," but that seems largely a rhetorical ploy rather than a commitment to definition. As a practical matter, nothing need turn on determining the "province" of no-fault — perhaps because we are dealing only with legislative process and are thereby relieved of that pursuit of coherent principle or concept which is characteristic of the common law process. It will nonetheless be helpful to attempt at the outset to locate more explicitly the commonalities underlying the myriad of current no-fault proposals.

The following characteristics are present in all or almost all plans:

(i) Speaking very loosely, the heart of a plan is a package that, perhaps reflecting the layman's two questions, contains a double prescription.

To the extent applicable, the prescription advises a person how he will be treated in each of two roles: one if he is an auto accident victim; the other if he is the "cause" of an auto accident injury to another. In each case, unlike at common law, the answer seems to be ready and uncomplicated. It is on the surface a non-fault answer. As victim, a person can within limits claim reparations on the simple fact of the accident, regardless of whether his conduct, or that of any other, was flawed. As actor, a person may be thought of as immune within limits from a claim against himself due to his actions. Thus the package is a "no-fault" package in the sense that fault has ceased to be a primary operative fact, either from the point of view of the victim or the actor.

(ii) There are two points to make about what might be called the "jurisdiction" of the package. First, the jurisdiction is arrestingly limited to auto accident; financing is solely from motorists, not from public revenues, and not, it should be noted, from all those who might be beneficiaries. Second, all plans have in common the aspiration of furnishing the arrangement for handling a large majority of auto accident events and auto accident claims. They thus can be looked upon as replacements for the preponderant part of the common law's business in the auto accident world.

(iii) The key mechanism of any plan is the use of insurance to create a fund into which a person contributes as motorist and against which he, and others, claim as victims. Participation in the fund is compulsory; it is in effect a condition to the use of an automobile. In all plans advanced to date, the insurance underwriting has been left to private industry; the state has not intervened to compete or to take over as a monopolist.<sup>6</sup>

(iv) Every plan defines fairly precisely the measure of *unconditional reparations* (not conditional on fault) that will be provided an auto accident victim. In setting the measure of unconditional reparations, no plan regards itself as foreclosed by the standards of common law damages.

(v) In distributing unconditional reparations, all plans avoid the common law dilemma of estimating the extent of future losses for the purpose of providing a once and forever lump sum award. They do so by mandating prompt payment of losses periodically.

(vi) There remain three further characteristics which are perhaps derivative of what has already been noted. Victims who are carrying auto insurance will in all likelihood be making their claim for unconditional reparations with their own insurance company — that is, the insurer to

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<sup>6</sup> Much of the criticism of the tort-insurance system has stressed expensiveness due to inefficiency as measured by percentage of premium dollar returned in benefits. A considerable part of this cost of delivering benefits is traceable to acquisition costs under private insurance. Insofar as plans use private insurance, this cost factor will remain large. A recent study of first party health insurance shows percentages of benefits recovered ranging from 67.2% to 33.5%. *Mail Order Health Insurance*, CONSUMER REP. 304, 308 (May, 1973).

which they have been paying premiums.<sup>7</sup> Moreover, under the package arrangement, a pedestrian involved in an auto accident will be able to get unconditional reparations though his own conduct was flawed at the time; this will be true even though he is not a car owner and therefore has not contributed to the fund. Finally, a motorist who is required to contribute to the fund will be able to get unconditional reparations even though no other human agency is involved in the accident — for example, when he drives his car into a tree while driving alone.

Beyond these commonalities, plans can be grouped into broad sub-categories in several ways.<sup>8</sup> One grouping is between those plans that aspire to only minimal unconditional reparations and those plans that aspire to substantial unconditional reparation of victims. This difference, which for many purposes might be ignored, will become crucial at later stages in the discussion. Another grouping is between those plans that explicitly abolish tort liability in specified areas and those plans that affect tort liability only in the sense that provision of unconditional reparations makes such liability superfluous.

This summary has been drawn in quick strokes that involve marginal inaccuracies. It was done so advisedly in order to catch a profile. We turn for the remainder of the Article to points which concern not the commonalities, but the differences possible among plans.

Such discussion proves to be treacherous to organize. We have adopted an unexpected tactic of organization. It is to center quite arbitrarily on two topics — *awards* and *costs*; and by pursuing these in some depth to

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<sup>7</sup> The fraction of victims who make claims against their own insurance company may be materially affected by whether the plan provides that the insurance follows the family or follows the car.

<sup>8</sup> The term "add-on," which is becoming salient in discussion today, reflects this second distinction. Where the plan does not explicitly eliminate any part of the tort system, it can be said that a system of unconditional reparations has been "added on" to the tort system (or it can be said that the reparations insurance has been "added on" to the liability insurance). The choice of the term is unfortunate. It suggests double recovery in the sense that the victim can recover both unconditional reparations and tort damages for the same loss; the fact is that very few of the "add-on" plans result in such double recovery. Moreover, the term masks two similarities between add-on plans and other plans. First, absent double recovery, the unconditional reparations distributed under either type plan equally siphon off business from the tort system. Second, as will later be developed in the text, the "non-add-on" plans also leave the tort system open to some extent. The functional question should not be whether the plan is "add-on" or something else, but what business in fact is left by the plan to the tort system. It is this question that we explore in the text in our discussion of ceilings, gaps, and treatment of pain and suffering.

Our stance is that nothing significant turns on whether "add-on" arrangements are classified as "plans." For more than a decade first party provisions, such as the medical payments clause and the uninsured motorist clause, have been tacked on to liability insurance policies. There are innumerable gradations possible in moving from the tort-insurance system towards a plan, and it seems sterile to argue over when the movement is far enough to qualify for the term "plan."

A somewhat comparable set of observations may be made about the term "no-fault." It has proved remarkably effective as a matter of rhetoric, but it, too, is an unfortunate choice. The confusion engendered by the term covers much the same ground as in the case of the term "add-on." From one point of view, "no fault" means only that reparation is unconditional. From another point of view, it means abandoning fault as relevant by explicitly eliminating the tort remedy. Since all plans to some extent preserve a tort remedy, there is, if the usage is taken seriously, no instance of a "pure" no-fault arrangement.

produce an agenda for discussing the many issues that interrelate with them.

## 3

A principal concern of any plan is how much the accident victim should be awarded for his accident experience. All plans offering substantial unconditional reparations to victims for personal injuries have had to deal one way or another with three specific operational questions: (i) Is there any top *limit* on the unconditional reparations the plan will pay the victims? (ii) Is there at the bottom, so to speak, any *minimal* loss for which the plan will not make reparations? (iii) To what extent are the unconditional reparations to be the *exclusive* source of compensation — or is the common law tort action to some extent to be preserved?<sup>9</sup>

Whatever the variety of answers given to the three questions, there is one overriding observation to make about the responses. No plan has ever attempted to provide full common law damages as unconditional reparations to all victims. Numerous reasons for this have surfaced in the literature about plans: a desire, for reasons of administrative efficiency, to keep damage items as objective as possible; a criticism of some items of common law damages as unsound even for the common law; a distaste for the exploitation felt to be involved in the publicized million dollar awards; and a practical conviction that it would be wholly impolitic to have the new arrangements under the plan be *that* expensive. Behind such reasons we sense a point of principle. The upshot of a plan is to effect a shift from a redress perspective to an insurance perspective. As a result, one is liberated from being controlled by the common law damage answers, and even from being much guided by them.

For purposes of a plan it is proper to look elsewhere to set the award levels. The puzzle is where to look. There is an unexamined choice of basic assumptions underlying most discussions of award levels. To overstate the polarity: Are the award levels to be set on the assumption that there is a more or less fixed aggregate pool to be distributed as unconditional reparations to the victims, *or* on the assumption that the size of the pool is not a given, but is to be determined by notions of what the award levels *ought* to be? It is our impression that in almost all discussions it is implicit that there is a more or less determined limit to the pool, and that this sense of limit is perhaps the controlling factor in determining the award structure.

One does not have to look far for an explanation. A chief point of rhetoric in the advocacy of plans has been that they will offer a better product, dollar for dollar, than the motorist is now buying; in brief, under a plan, a motorist's total insurance premiums will not increase, but will in

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<sup>9</sup> There is a necessary awkwardness of language here. We mean "exclusive" as against the tort remedy for an auto accident loss. The reference is not to sources of reparation other than the plan or the common law. The problem of coordinating different regimes of reparations is discussed later in the text.

all likelihood decrease.<sup>10</sup> It follows that the maximum size of the pool to be distributed in unconditional awards has to be set by the size of the "pool" that is generated under the common law tort-insurance system. Whatever the need to acknowledge the political imperatives, an anomaly lurks here. The award potential under a plan is being largely determined by a factor which is irrelevant to the aspirations of a plan. The aggregate amount the common law "collects" for distribution to victims is crucially affected by the fact that the law is not intended to pay all victims, but only those who qualify under common law liability rules. A principal point of every plan in mandating unconditional reparations is to reject those common law criteria of eligibility for compensation. Yet in effect the outcome is to permit these rejected criteria to limit how much a plan will do for victims. This almost automatic acceptance of the size of the common law "pool" as a limitation may be a key clue in explaining why the discussion of awards under plans has been so little concerned with theory. Once it is assumed that the size of the pool is already determined, many genuine issues about award levels are readily short-circuited.

## 4

Plans, particularly high-ceiling plans, have been designed as if to meet the problem of insolvency: the losses of victims are like claims that exceed the total assets of the estate or "pool" to be distributed. One solution has been to refuse recognition to certain claims or losses hitherto accepted as valid. Excluding from the unconditional reparations any claims based on pain and suffering is, we suspect, largely a strategy for dealing with the "insolvency" problem — although, as will be seen later, it admits of other rationales.

But the point we wish to build on here is the response of plans *even to items of strict economic loss*.<sup>11</sup> Whatever the case for pain and suffering as loss,<sup>12</sup> the case for recognition of loss of earnings is more sturdy and stubborn. If we assume for the moment that the rationale for limiting compensation for loss of earnings is the sheer insufficiency of the pool to meet such loss in full, there are three principal ways to "balance the budget." A plan can employ a floor, a ceiling or upper limit, or a percentage scale-down of claims. Purely as a matter of arithmetic, any of these methods will serve to make the fund go around. While traces of floors and scale-down arrangements can be found in proposed plans, the dominant strategy has been to impose an upper limit or ceiling.

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<sup>10</sup> Indeed, under several plans the legislation has mandated that there be a 10% to 15% reduction in insurance premiums coincident with the plan becoming effective.

<sup>11</sup> For convenience we have chosen to talk only about loss of earnings. We could have talked about the combination of medical expense and loss of earnings. To the economist both are economic loss. For our purposes, nothing turns on giving fuller reparation for medical expenses than loss of earnings, a difference many plans have accepted.

<sup>12</sup> We are using "pain and suffering" in a broad sense to encompass all aspects of intangible loss accompanying an accident, including loss of enjoyment, humiliation, disfigurement, indignity, and so on. We prefer the term to the colorless "non-economic."



This preference for a ceiling yields the anomalous result that the more serious the economic loss, the greater the likelihood that it will *not* be paid in full by the unconditional reparations of the plan. Assume a \$4,000 ceiling on unconditional reparations for economic loss: all losses below \$4,000 will be paid in full; a loss of \$6,000 will be compensated two-thirds; a loss of \$8,000 will be compensated one-half, and so on. If instead the preference were for a floor, the result would be that the larger the claim, the greater the percentage of loss paid. If a pro rata scaling down were the preferred alternative, the result would be that all claims, whatever their size, would bear the same fraction of uncompensated loss. But it should be noted that under neither the floor nor the scale-down approach would *any* victim recover one hundred percent of his economic loss.

We find it a considerable puzzle that the floor and scale-down alternatives have not proved more popular to plan designers. Use of the floor would serve to eliminate a large fraction of the total number of claims being processed under the common law tort-insurance system; it would yield great internal economies in administration and have a direct bearing on the nuisance claim phenomena; it is, moreover, given its wide use in collision insurance, a device very familiar to the motoring public. Use of the scale-down alternative would have the deep appeal of treating all claimants evenhandedly.

The puzzle cuts deeper. For generations, a grievance urged against the common law has been that it so often dealt harshly with the seriously injured victim of an auto accident. Surely a much voiced aspiration of plans has been to do better by him. An empirical finding which has been widely publicized by advocates of plans appears to show that the common law tends on average to grossly overpay small claims, while grossly underpaying large ones. Whatever the aspirations of plans, the achievement is, at best, to correct the overpayment for small losses, while continuing to underpay large losses — once the “budget is balanced” through ceilings.<sup>13</sup>

It may be helpful to consider why those who design plans nevertheless have found the choice of a ceiling so attractive. Undoubtedly there has been a strong desire to be able to say that the vast majority of auto accident victims recover their losses in full — a claim which, as noted, is precluded by use of either the floor or the scale-down. There is further the desire to be able to say that if there is a bias in the plan, the bias runs in favor of the poor.

Use of a floor may present some distinctive drawbacks of its own. It precludes saying that *all* victims will now receive at least *some* compensation. It may also invite insurance industry opposition because it could cut so deeply into the volume of business.

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This discussion of award levels for economic losses is obviously incom-

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<sup>13</sup> This bias in plans is explored in Spangenburg, *No Fault Fact, Fiction, and Falacy*, 44 Miss L.J. 15 (1973).

plete. We have been writing as though the unconditional reparations under a plan were to be the exclusive source of compensation. In the historic analogues this was the case. Workmen's compensation, the grandfather of all compensation proposals, and the Columbia Plan of 1930, the first auto plan, were both total replacements of the tort system.<sup>14</sup> Another overriding observation about contemporary auto plans is that virtually never are the unconditional reparations designed as the exclusive source of compensation — virtually all plans keep a tort remedy open to some extent.<sup>15</sup>

The full story about reparations for economic losses then is that it may include unconditional reparations under a plan in combination with some redress under the tort system. Does this combination mitigate the bias against serious harms in the handling of economic losses?

The situations on which to focus are those in which economic losses exceed the limit specified in the plan, whatever that limit may be. The question concerns the fate of these excess economic losses. Assume for present purposes that the plan imposes a relatively high ceiling on awards so that in the vast majority of cases economic losses are compensated in full by the unconditional reparations. Assume also that the part of the common law tort remedy that is preserved will serve for many victims to take care of their economic losses that exceed the unconditional reparations ceiling. A puzzle nevertheless resides in this combination treatment of large economic losses.

The total scheme still appears to discriminate in favor of less seriously injured victims. It seems a fair assumption that large economic losses are associated with more serious auto accidents. Whatever the arguments for compensating victims without regard to fault, these arguments would seem to be stronger in cases where the accident is more serious. The excess economic losses of some victims will not be recoverable because their claims will be ineligible under the liability criterion of the common law. The outcome then of combining the tort remedy and the unconditional reparations of the plan is still that economic losses of the less seriously injured victims will be paid under *all* circumstances, while the economic losses of *some* of the more seriously injured victims will be paid only in part.

For the plan with a high ceiling there are further embarrassments in preserving the tort action. Such a plan is designed to replace the tort system altogether in all but the small minority of very serious cases. The arguments made on its behalf have heavily stressed the inadequacies of the

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<sup>14</sup> Workmen's compensation was a total replacement of any tort action the employee might have had against his employer. It did not, however, always preclude a tort action by the employee against a third party who injured him while the employee was within the course of his employment.

<sup>15</sup> There may be another sense in which a trace of the tort system survives. A not uncommon feature of plans is provision for the subrogation or reimbursement of the insurer who pays the unconditional reparation. As a result, the ultimate burden may be shifted to the insurer of the actor and off the insurer of the victim. In some plans the criteria for subrogation or reimbursement are explicitly those of common law liability. For the most part the plans require that such adjustments among insurers be kept out of court and be handled through arbitration.

existing tort system. These arguments reduce to the complaints that only victims "lucky enough" to be hit by a negligent driver may recover, and that the system carries an undue invitation to fraud. But it stands to reason that high economic loss correlates to the more serious injury. The use of a ceiling on economic loss leaves a higher portion of that loss beyond the coverage of unconditional reparations, the more serious the injury. Thus, the more serious his injury, the more the victim is left to the mercies of the common law tort system, which will be as imperfect as before. It is implausible that the fault criterion for reparation becomes less arbitrary and the invitation to fraud less potent as the injury becomes more serious.

Whether or not the tort remedy is kept open above some level, the use of a ceiling on unconditional reparations involves the plan in discriminating against the more seriously injured victims. This inconsistency might be met in at least two ways: (i) by questioning the justice of paying in full the high economic losses of the more affluent; (ii) by relying on the use of voluntary insurance to cover the excess economic loss.

## 6

The justice question is worthy in its own right and has more than one strand. In contemporary society there seems to be a deep-seated uneasiness about high incomes, and undoubtedly some of this carries over to economic losses that reflect high incomes. People whose incomes are considerably higher than the median are likely, if injured, to suffer economic losses beyond the ceiling of a plan. One need only reflect for a moment on the \$200,000 a year athlete who is temporarily disabled as a result of an auto accident. A year's disablement results in an economic loss ninety-five percent of which may well be above the limit for a plan, but which may also be twenty times the economic loss for the laborer who suffers comparable injury. This example is admittedly extreme, but is used only to dramatize the strains on any award system that may be generated by the unequal distribution of earned income in society.

At common law the tort system never experienced any qualms in redressing full economic loss regardless of disparities in income levels.<sup>16</sup> It would be unheard of for a defendant to argue that his damages should be reduced because the plaintiff's income was unseemly high! Tort law, engaged in corrective justice, was able to leave matters of distributive justice for other branches of the law to deal with — if at all.

Calling into question the justice of the earned income distribution in society raises a point so powerful that it becomes difficult to know what to do with it. In this context, setting the ceiling on awards under a plan is inescapably perceived as a normative judgment. In a fashion reminiscent of earlier literature on tax justice, the ceiling suggests a distinction

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<sup>16</sup> The question comes up tangentially in cases involving the interaction of a progressive income tax with common law damages for loss of earnings. See, especially, *British Transp. Comm'n v. Gourley* (1955) 3 All E.R. 796 (H.L.).

between two levels of income.<sup>17</sup> The first level is that which is "normal" — that is, expected to be used in usual consumption patterns; the second level is that which is "surplus." In taxation this distinction was employed to justify taxing the surplus income at higher rates; in designing compensation plans the distinction can be used analogously to justify not providing unconditional reparations for economic losses above the ceiling.

Notions of surplus income, whatever their plausibility, cannot be decisive for the handling of all high economic losses in the special case of auto accidents. The stumbling block is the serious disability injury. People with middle bracket incomes surely can suffer injuries producing very high aggregate economic losses. To revert to our athlete example again, a journeyman worker with only one-twentieth of the athlete's income may, if disabled for life, suffer an equally large aggregate economic loss. Indeed, the predominant experience with high awards under the present tort system has not been with injuries to the high income earner, but with serious injuries to the man whose income is not high enough to be regarded as surplus. Designers of high ceiling plans presumably would like to take care of this dominant case of severe economic loss, even when for distributive justice reasons they may not wish to cover losses reflecting merely high earned income.

There would seem to be a practical method for separating the treatment of the two situations. All that need be done is to state the award ceiling not in a single aggregate amount, but rather as a limit on loss of earnings incurred in a given time interval; no limit would otherwise be imposed on the total loss that may be covered by reparations.<sup>18</sup> What is striking here is that a detail of plan design — the ceiling format — turns out to implicate a serious and interesting policy question concerning distributive justice.

## 7

The other route to justifying limitations on awards for economic loss, under plans with high ceilings, is to rely on the opportunity for the motorist public to voluntarily buy insurance to cover any above-ceiling economic loss. Put this way the analysis may again contain an implicit notion of surplus earned income. The thought seems to be that the high earner, if he is concerned about protecting his earning power in full from accident loss, can afford to take out insurance to cover himself. And if he does not, there is no reason why society should have any great interest in second guessing his judgment.

This approach runs into serious difficulties too, once account is taken of the sources of high economic loss. The dominant case, as pointed out, will

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<sup>17</sup> This literature is summarized in W. BLUM & H. KALVEN, *THE UNEASY CASE FOR PROGRESSIVE TAXATION* (1953); Blum & Kalven, *The Anatomy of Justice in Taxation*, in *THE GREAT IDEAS TODAY* 130 (1973).

<sup>18</sup> The best example of this solution is found in the Uniform Motor Vehicle Accident Reparations Act, which provides for a limit of \$200 per week on loss of earnings, but sets no limit on the number of weeks over which the loss may accrue.

be that of the middle income victim. As to him the suggestion that he can make himself whole by voluntary insurance calls into question the social achievement of the plan.

It calls into question something further — the basic commitment that the plan be *compulsory* on the motoring public. Consider first the situation of the man with a large earned income. A plan with a high ceiling explicitly accepts and relies on his judgment as to what to do about the possibility of excess economic loss — which may well be the major part of his loss. If we give him the choice of being a voluntary insurer (or a self insurer) of so major a part of his loss, should he not be accorded the same choice with respect to the whole of his loss?

Is the compulsion different if we focus attention on the accident victim whose income is near the median? A high ceiling plan (that is well designed) will be *compelling* him to insure against *substantially all* of his economic loss from accident. Granting that most people in the median income range would find such insurance a sensible buy, is this a sufficient basis for compelling those who do not see it that way to buy the insurance? Some, once stimulated to think about first party accident insurance, may prefer to buy some more general form of protection, rather than one confined so provincially to auto accidents alone. Others may not wish to insure at all because they have different risk preferences, as is so often apparent in the case of life insurance. For these people, and others, there is a puzzle about the policy behind the compulsion.

However the matter of compulsion may stand as to those with median incomes, is there any way of at least permitting those with high incomes, as to whom the case for compulsion is weakest, to have a choice? The theoretical merit of drawing such a distinction among income levels need not detain us. There is no way to put it into practice. It is not feasible to isolate those who will be permitted to opt out. We here confront, in the unexpected context of an auto plan, the well-known and formidable difficulties of introducing into the law “a means test” — difficulties that have become so familiar under social security and welfare measures.

## 8

The discussion of award levels for economic loss is still incomplete. We have been directing attention to plans that aspire to unconditional reparations up to substantial amounts. At the outset in our profile of plans we noted that one category of plans had a different aspiration, not calling for substantial reparation. This difference introduces a new note into the discussion. One of the most intense points in debate over plans concerns this difference. The question is: *At what level* of economic loss is the unconditional reparation under the plan to stop and the conditional reparation under the common law to begin? On the surface the debate appears to be over a mechanical detail of little theoretic import — should the award limit under the plan be \$500, \$1,000, \$5,000 or \$10,000? But beneath the surface there is posed a fundamental policy choice.

Data providing a rough estimate of the distribution of economic losses in auto accidents illustrates the ramifications that underlie this choice.<sup>19</sup>

<i>Economic Loss</i>	<i>Aggregate Economic Loss</i>		<i>Persons</i>	
	<i>Dollars (millions)</i>	<i>Percent</i>	<i>Number (thousands)</i>	<i>Percent</i>
\$ 1 — 999	\$ 891	15%	3,833	90%
1,000 — 4,999	714	12	294	7
5,000 — 9,999	397	6	60	2
10,000 — 24,999	517	9	31	1
25,000 and up	3,447	60	45	1
Totals	\$5,966	102*	4,263	101*

(\* over 100% due to rounding)

There is no need to settle on a definition of a serious loss in order to acknowledge two key relationships. First, the larger the economic loss, the less frequent its incidence. The gravest economic losses occur in only a very small minority of instances. Second, turning to dollar aggregates, a substantial fraction of *all* economic loss suffered by all victims falls upon the relatively few who are seriously injured. If a choice must be made, there is a tough issue of locating the principal social problem. Is it more important to take care of the vast majority of auto accident victims — under which premise any scheme which disposes of say 85 to 95 percent of such claims is the solution? Or is it more important to concentrate resources on the minority of seriously harmed victims?

Against this backdrop, polar responses have emerged in the popular debate. On one view unconditional reparations under the plan are seen as the heart of the matter; and whether or not the tort system is kept open at any level is pretty much a minor strategy or a footnote. Predictably, high ceilings are advocated. On the opposing view the tort system, with its traditional merits, continues to be seen as the heart of the matter; unconditional reparations under the plan function simply as a way of disposing expeditiously of losses from less serious injuries. Again predictably, low ceilings are advocated. The tort system remains as the channel for what is seen as the central job — the handling of seriously injured auto accident victims.

Under either high or low ceilings there is an embarrassment. With the high ceiling alternative it proves awkward, as we have seen, to explain why the tort system is left alive at all, and there arises an apparently ineradicable discrimination against victims having the most serious injuries. With the low ceiling alternative it proves awkward to explain the need for introducing a plan at all.

<sup>19</sup> This table is our best estimate compiled from figures in two Department of Transportation studies: U.S. DEPT OF TRANSP., *MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES* (1971); U.S. DEPT OF TRANSP., *ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES* (1970). For a comparable estimate based on the same sources see Spangenburg, *No-Fault Fact, Fiction, and Fallacy*, 44 Miss. L.J. 15, 50 (1973).

Evaluation of low ceiling plans is dampened because they have been put forward largely by the trial bar. The function of the low ceiling has been viewed with deep suspicion since it preserves the symbol of a plan, while leaving as much of the tort system, and therefore the business of the trial bar, as undisturbed as possible.

It is not, however, altogether implausible that a low ceiling plan would be proposed on its merits. Several lines of argument could be advanced for such a plan. Certain characteristics of small claims make it advisable to exclude them from the tort fault system. It is widely thought that they are unduly expensive to process. The expectation is that internal economies from paying small claims unconditionally under a plan will result in substantial savings. Indeed, it is hoped that these savings will make it possible to pay all small claims for economic loss, whether or not compensable at common law, without any increase in overall insurance costs to motorists.<sup>20</sup> On this approach, it might be noted, pressure to employ a ceiling does not, as it did with the high ceiling plan, come from what we have called the fixed fund or the "insolvency" dilemma.

Another concern, especially prominent in the literature, has been with the overpayment of small claims because of their nuisance value. This, it is often said, injects a major injustice into the distribution of damages under common law settlement practices. It is argued that the simplicity of unconditional reparations under a plan will vastly reduce the nuisance value of small claims and their exploitative potential.

If support for the low ceiling plan is predicated either upon the dis-economy or nuisance of processing small claims, why not eliminate small claims from the tort system altogether? Doing so would certainly remove these evils and with the maximum savings to society. If the tactic is to set the ceiling so as to just catch the small claim, leaving everything else to the common law, the purported goals might be better achieved by dropping the plan altogether and, as the alternative, merely setting a floor for redress under the tort system.

The logic plays differently if the assumption as to the purpose of the low ceiling is changed. Such a ceiling may be explained on the ground that a plan will have done enough if unconditional reparations are made in full for the range of auto accident claims that will be experienced by the vast majority of the public. A major part of the rationale here presumably derives from distaste over asking financially poor victims to handle these losses themselves. But if so, this sharply differs from most proposals for assisting the poor. It would avoid having the poor manage the injury losses individually by insisting that the motoring poor (like other motor-

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<sup>20</sup> It is often argued that the internal savings in administering unconditional reparations, as measured against administering conditional reparations, should be sufficient to pay for the additional coverage of victims ineligible for recovery at common law. The ratio of savings to pay-out declines as the amount of reparations goes up. It may be possible to locate a sort of optimal point for a ceiling — the point at which the internal savings just meet the pay-out on coverage of the additional victims. It is not clear, however, that this line of thinking has ever been used as a rationale for a low ceiling plan.

ists) pay in advance for insurance to cover such losses. The puzzle that arises keys once again to the fact that the plan is compulsory. Consequently there is the old problem of forcing people by law to do what is good for them. In this version, the lower the ceiling, the more the "official advice" is concentrated on the poor.

Additional questions about the fit of the sumptuary principle readily come to mind. Is there really *sufficient* justification for being sumptuary on behalf of the motoring poor? Might they not rationally prefer to bear the loss themselves; or, if they elect to insure, might they not choose to cover the unlikely but serious loss rather than the more likely but less serious loss? Can there, moreover, be *any* justification for applying the sumptuary principle to the small losses of the more affluent? Or are they included only because we cannot design any political way to leave them out while insisting upon helping the poor?

It thus appears that compulsion raises difficulties for both high and low ceiling plans. In neither case is it possible to devise ways of screening out those who may not be the object of the coercion. With a high ceiling, it appears that to reach the objective — to force the middle classes to be prudent enough to insure substantially all their losses — it becomes necessary to compel the upper income people to insure. With a low ceiling, everyone is compelled to insure in order to reach the objective of forcing the poor to be prudent enough to insure their typical losses.

## 9

So far it has been assumed that the possibility of unconditional reparations under the plan would stop and the possibility of a tort action would begin at precisely the same level. This, however, need not be and, in many plans, is not the case. There may be a deliberate "gap" between what is unconditionally compensable under the plan and what is recoverable under common law. If so, amounts within that gap are neither compensable under the plan nor at common law. The gap, it might be noted, may take more than one form. The plan may simply impose a dollar ceiling on recoveries for economic loss, above which no loss is compensable in unconditional reparations, and below which all losses are compensable in full. In this format a gap is introduced if the level at which the tort action takes over as a source of reparations is set higher than the ceiling. In another form there is a percentage limitation on unconditional reparations for losses below the ceiling amount — for example, where the plan provides that seventy-five percent of economic loss up to a given dollar amount may be recovered. With such a provision, even if the dollar ceiling for unconditional reparations and the dollar floor for conditional tort redress are set at the same point, there will be a gap representing that percentage of loss (twenty-five percent of the ceiling dollar amount in the illustration) which was excluded under the plan. What is striking about all this is that any loss which falls within the gap is gone forever: it can be recovered



neither pursuant to the plan nor pursuant to the tort action. This technical feature poses another policy issue: Why deliberately have any gap?

Gaps seem to be a way of ensuring that small claims do not continue to bedevil the tort system. All plans pay small claims unconditionally. The use of a ceiling introduces a new generation of small claims — those that are just slightly in excess of the ceiling. A gap serves to handle this “new” small claim problem, and to do nothing more. Even with a high ceiling, the function of a gap is only to erase the small claim represented by a loss slightly over the ceiling. A gap thus functions as a deductible in the tort system.

There are other occasions on which an item of loss is denied unconditional reparations and is eliminated from redress under the tort system. A plan may impose a floor below which economic loss is not entitled to unconditional reparation. In order to carry out the *de minimis* policy of the floor, the plan must provide that such loss is also barred from tort recovery. In the case of pain and suffering, this tactic of denying both unconditional reparations and tort redress is more important and more complex. No plan has elected to bring such loss within unconditional reparations, and no plan has eliminated it totally from the tort system. Plans, however, differ greatly in defining the level or threshold at which such loss becomes eligible for tort redress. We trace this further in the discussion of pain and suffering, which follows.

Suffice it to say at this point that, whether we are talking about a technical gap, a *de minimis* floor, or a threshold for pain and suffering tort recovery, we are touching upon a basic and pervasive question. As to those losses excluded from unconditional reparations, why are some left redressable under the common law tort system, while others are denied redress altogether?

## 10

It has been another overriding characteristic of compensation legislation, dating back to workmen's compensation, to refuse to acknowledge pain and suffering as an item compensable by unconditional reparations. There has been intermittent criticism of pain and suffering as an item of damages at common law, but such criticism has never crystallized into reform. Today pain and suffering remains a vigorous component of personal injury damages.

Some proponents of plans have disapproved in principle of awards for pain and suffering and have seen the plan as an occasion for making a change they would like to have effected at common law. One who staunchly supports such damages under the corrective justice of the tort system might nevertheless be persuaded that there is no justification for including pain and suffering in a scheme of reparations that is wholly divorced from notions of either fault or indignation at being harmed, and that carries no echo of punitive damages.

Other factors very likely play a more important role in explaining the almost universal exclusion of pain and suffering from unconditional reparations. Pain and suffering, if perceived as loss at all, is somehow not of the same nature as other loss. Motorists are not likely to want to pay premiums to insure themselves against experiencing pain and suffering — but if pain and suffering were included in unconditional reparations, the plan would be asking people to do precisely that.<sup>21</sup> The most decisive reasons for its elimination may well be purely practical. If so unbounded an item were to be included in reparations, it would frustrate major objectives of plans — simplifying the processing of claims and reducing premium charges.

At the moment, a great contrast exists between how the courts and how the legislatures are responding to the phenomenon of pain and suffering. As the legislative momentum towards plans grows, there is an increase in the area of law in which pain and suffering will no longer be recognized as loss. At the same time, the courts, pursuing vigorously the common law principles of growth, have been reaching altogether new levels of intensity in acknowledging the awful reality of the intangible concomitants of accidents.

This ambivalence is spotlighted by the way plans treat the right to recover for pain and suffering in a common law action. Since no plan provides unconditional reparations for pain and suffering, a choice must be made whether the victim is to be left free to pursue such loss at common law. This choice is the heart of what is at stake in the dispute today between plans that explicitly eliminate tort liability and the so-called “add-on” plans which do not. Without a threshold below which there is no tort action for pain and suffering, it will be very difficult to keep premium costs down and to control nuisance claims. But any threshold formula seems odd.<sup>22</sup> Pain and suffering will be recognized only when fault is present; but even when fault is present in a valid common law claim, pain and suffering will be recognized only when it is relatively large.<sup>23</sup> Perhaps this result can be explained by a perception familiar to students of the common law tort system. Non-economic awards for graver injuries are rarely for “pain and suffering”; rather they are an acknowledgement of the indignity of the injury.

## 11

Before putting to rest questions about awards, we need to scrutinize more closely the matter of similarities and differences among victims. The point goes not to the infinite variety of ways in which potential auto acci-

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<sup>21</sup> It is striking how different the reaction to reparation for pain and suffering is, depending on who is paying for the insurance.

<sup>22</sup> It is also often arbitrary. The most ad hoc or unprincipled provisions in plans are those defining the threshold level for tort actions for pain and suffering.

<sup>23</sup> A few plans, it might be noted, while disfavoring recovery for pain and suffering enough to disallow it at lower levels, nevertheless favor it enough to allow double recovery — both unconditional reparations *and* tort damages — when the pain and suffering is above the threshold level for a tort action.

dent victims earn their incomes, nor to the level of their income, nor to the temporary or permanent nature of the loss of earnings. The differences among victims that will concern us tie to two factors: (i) whether the victim (or his immediate family<sup>24</sup>) contribute to the insurance pool supporting the plan; (ii) whether the victim has access to some other insurance pool.

This second distinction raises a question about the relationship of unconditional reparations under the plan and collateral sources, such as medical insurance, accident insurance, employment benefits, and the like. At common law, coordinating this aspect of damages is handled by the so-called collateral benefits rule, which to a considerable extent permits double recovery by the victim. It has been a common feature of plans to treat some of those other sources of recovery as offsets to unconditional reparations and thereby to prevent double recoveries by victims. This treatment is often thought of as being another way in which plans modify the common law award structure. We find it more convenient, however, to postpone its consideration until we take up the allocation of costs under plans. For purposes of the immediate discussion, we assume that there is no complication introduced by the presence of other sources.

We turn to the first distinction among victims — whether they have contributed to the insurance pool utilized by the plan. Whereas *only* motorists contribute to the pool, *all* victims recover. The result is that there will be a class of non-contributor auto accident victims. Its members are found among those who do not own cars and do not belong to families that own cars. They are equally members of the class whether they are injured while riding or as pedestrians. The arrangement under current plans can be conceptualized as one in which motorists take out first party insurance to cover themselves and their immediate families (or household relatives), and take out “third party” insurance to cover the unconditional reparations for this class of non-contributors.

To date no plan has deemed it appropriate to draw a distinction between these two groups of potential victims for purposes of fixing the amount of unconditional reparations. But despite this consensus, the question is interesting.

The judgments involved in setting the award levels need not be the same in the two instances. In the case of the contributor, who is really insuring himself, the judgment about awards must stem largely from the first party insurance aspects. The award level is thus constrained by notions of how far a man should be compelled to insure himself and his immediate family against misfortune. It is not easy to see why the answer to that question should control or be relevant in the case of the non-contributor victim. His position as a beneficiary in no way arises because he is insuring himself. The question as to the award level for him turns rather on how much insurance the state is going to compel the contributor motorist to buy for somebody else. This is a question of fairness. Again it is not easy to see why

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<sup>24</sup> The statutes often define this relationship in terms of household relatives.

the answer should have any relevance for determining how far we should force a motorist to insure himself and his family.

We will resist the temptation to pursue the analysis of which direction the distinction most plausibly runs — whether awards should be higher or lower for the non-contributor victim. There are in any event good practical reasons why plans have not drawn the distinction in setting award levels. Use of the distinction would entail a considerable administrative burden in determining into which category a particular victim fell and would lend undue weight to the definition of who is a member of a contributor's immediate family. But even when the distinction is not utilized, it remains true in fact that there are two such different categories of beneficiaries, and this fact necessarily complicates making any decision as to the level of unconditional reparations.

## 12

The second axis along which we wish to array policy issues is that of costs.

In writing on the auto compensation plan problem a decade ago, we stressed that the central issue, both practically and theoretically, was who was to bear the cost of the "additional coverage" under the plan — by this we meant in addition to whatever coverage the existing tort system already provided to victims. We have turned out to be poor prophets as to what was politically feasible — indeed the cost issue did not prove any sort of stumbling block. We have also proved poor guides to the center of the intellectual debate — indeed discussion of the cost issue never became salient and today discussions of costs are less evident than ever.

Perhaps the reason for this inattention has been the implicit assumption, already noted, that plans were committed to achieving their purposes without increasing the premium costs to motorists. The dominant political rhetoric was to promise virtually all motorists an actual reduction in premiums. The only sense in which costs were openly discussed was to ask whether in fact motorists would be compelled to pay more under a plan than they had at common law. Since the governing premise was that everyone would pay less, it seemed academic to speculate on whether the costs under the plan were being borne properly.

The relevant question about costs is not whether a given plan will cost motorists more than the existing tort-insurance system costs them, but rather who should pay for whatever the plan does cost. The common law is no more trustworthy as a guide for the sharing of costs under a plan than it was for setting the levels for unconditional reparations. As with awards, the question again is: If the common law is not a guide, what should be?

In starting our pursuit of this cost question, it will be helpful to employ again the distinction between beneficiaries who are contributors to the pool and beneficiaries who are non-contributors. The distinction becomes architectonic for the issue to be explored.

We focus first on the handling of costs arising from the claims of non-contributors. There can be little question that not requiring contributions to the pool from those who do not own cars, or whose immediate families do not own cars, reflects a practical necessity rather than a normative judgment that they ought not be asked. The plan presumably would make them pay if it could. All auto plans are tied to ownership and licensing of the auto as the mechanism for the collection of insurance premiums. Since anyone in the community might be the victim of an auto accident, there is no way in advance of isolating a class for purposes of seeking a contribution; and if a person does not own a car, there is no practicable way to charge him for insurance coverage.

This explains why the non-car-owning group is not forced to contribute under a plan, but it does not explain why they are allowed to recover unconditional reparations. In theory, at least, it would have been possible not to extend such reparations to them, and to keep the tort action alive for this group of victims. The attractiveness of the social objective of having *all* auto accident victims recover was clearly felt strongly enough to create what might be called reparation without taxation. There were undoubtedly other reasons for the decision as well. To keep the tort action alive even for this group alone would defeat another objective of plans — that of eliminating the tort action for all claims below a certain level. Perhaps still more compelling was the desire to avoid the practical difficulties that would be occasioned by having to determine whether a given claimant at the time of the accident was a contributor or a non-contributor, and to avoid as well the important pragmatic consequences of that determination for awards in some cases.

When exploring why contributors are made to pay for the unconditional reparations coverage of non-contributors, it is important to discard the perspectives of a strict first party insurance arrangement. If a plan is to take out of the tort system the claims of non-contributors as well as those of contributors, an important choice is presented. Since no one would urge that non-contributors should be excluded from the reparations pool when their common law rights are being erased, and since there is no practical way of having them contribute to the pool, another source must be used to enlarge the pool on their behalf. There are only two practical possibilities: either the general public pays through taxes or the motorists pay. All plans to date have placed the burden on motorists. At common law a good deal of this burden was already on motorists through the operation of the liability rules and third party liability insurance. The plans call for using a form of "third party" insurance to fund the losses of *all* non-contributor victims.

It is at this point that the design of the contemporary auto plan touches the old-fashioned issue of costs that was so central to the workmen's compensation controversy and its aftermath a half century ago. That question was seen starkly as: Why, apart from fault as a justification, should *A* be made to pay for a loss suffered by *B*? One answer, borrowed from the

idiom of the economist, is that activities should bear their own costs in a rational market society. Otherwise resources will be misallocated, and there will be a loss of efficiency in the special economic sense that consumer choices will be less perfectly represented in the way resources are allocated. A half century ago the cry was that the blood of the workman should be reflected in the cost of the product. The contemporary analogy is that the blood of the auto accident victim should be reflected in the cost of motoring.

It is doubtful that this premise is a vital part of the case for auto plans today. Reference is often made to it, but it is never discussed in any depth and there is never a sense that the case stands or falls with the premise. Nevertheless, it is worth noting that the premise does not bear scrutiny when applied to auto accidents. Insofar as the economist's idiom is understood to mean that accidents — for the purpose of an efficient allocation of resources — are a cost of motoring, it is misunderstood. There appears to be no way to isolate the role and contribution of owning and operating an auto in producing auto accidents from the role and contribution of other activities. The incidence of accidents is significantly affected by many factors, including population density, road design, pedestrianism, mass transportation, and so on. Motoring of course is a contributing factor to auto accidents, but there is no way of telling how much of the accident cost should be charged to it in order to advance the objective of efficiency in resource allocation.

The history of workmen's compensation proves instructive on another point. While popular controversy centered on the slogan that industrial accidents were a cost of employment, the constitutional controversy over the due process of charging the employer for all industrial accidents was framed not in terms of who should bear the loss, but rather in terms of "a bargain." The "bargain" was struck by the law between employer and employee. At common law, in the event of an industrial accident, the employee could sometimes recover and sometimes not; correlatively, the employer was sometimes liable and sometimes not. The essence of the "bargain" imposed on both sides by the statute was to make the employer liable in all cases, but for a lesser amount, and to give the employee a lesser amount, but provide recovery in all cases. The quid pro quo for the employee was some recovery in those cases where he would have been altogether ineligible at common law.

One might draw an analogy to this sort of "bargain" in the contemporary auto plan. The non-contributors are like the employees and the contributors are in a sense like the employers. Once again the trade is of contingent common law rights for reduced but certain rights under the plan, and of contingent common law obligations for broader but reduced obligations under the plan.

As far as we can tell, no one today seeks to justify charging contributors for the losses of non-contributors by using the "bargain" theory. It may well be that no justification is thought to be called for. Or it may be that

today the bargain metaphor has worn thin: it has become apparent that it only verbally circumvents the cost issue. Consider workmen's compensation again. It was a "bargain" only in terms of trading the *prior* rights and obligations created at common law. If the legislature had been deciding how to handle the industrial accident *de novo*, without the common law background, it would have been meaningless to speak of its legislation as a "bargain." All the statute did in coercively imposing the "bargain" was to impose its formula for allocating costs between employers and employees.

In the case of auto plans, the "bargain" imposed by the legislature results in a complicated allocation of costs between contributors and non-contributors. The complicating factor is that non-contributors fall into two groups: those who had valid claims at common law and those who did not. The cost of reparations for the former is left where the common law placed it — on motorists (who are the contributors). It is highly probable that a good part of the cost of covering those non-contributors who would not have had valid claims at common law — and hence represent a new reparations burden — is being borne by those non-contributors who would have had valid claims at common law.

### 13

Contributors as a universe and non-contributors as a universe represent quite different risk rating problems.<sup>25</sup> While as we have seen there is something of a problem in the handling of the non-contributor class, it is distinctly a problem involving the minority of victims. The major domain of a plan today is the handling of contributor victims. In our society the number of cars has so vastly increased relative to population that most people will be either car owners or immediate members of car owners' families. The upshot is that there will be a great overlap between contributors and victims: all contributors will be potential victims, and most victims will in fact be contributors. It is this distinctive set of facts which makes it possible today to utilize first party insurance as the dominant technique in plans for handling the auto accident problem.<sup>26</sup>

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<sup>25</sup> We make no effort to deal with a third category which might be important for purposes of analyzing how costs are borne. This category consists of owners and operators of commercial vehicles. (A companion point might be made about public vehicles.) Some plans explicitly exclude such vehicles from unconditional reparations and compulsory first party insurance. The upshot is that the costs of auto accidents caused by such vehicles continue to be borne by the enterprise in the same sense that they were before the advent of a plan. In many of these instances, these costs will not be fully shifted back to the victims, who as a class are not the only customers of the enterprise. To this extent it can be said that in some auto accidents the costs of the accident are not necessarily borne by the victim.

<sup>26</sup> When compensation legislation was first proposed, there was, as evidenced for example by Ballantine, *A Compensation Plan for Railway Accident Claims*, 29 HARV. L. REV. 705 (1916), considerable talk about sharing the accident loss between the victim and the actor. There is little such talk today with respect to auto plans, and for good reason. Insofar as the plan is committed to first party insurance, for the motorist and his family (the contributors), the loss remains on the victim whether or not the plan shifts it to the pool for unconditional reparations or leaves it with the victim. What is involved here is not whether there is to be a sharing of loss between the victim

It is true that first party insurance is the oldest type of insurance. Yet when one starts from the tort perspective, as have almost all discussions of auto plans, the introduction of first party insurance requires a major and almost startling switch in viewpoint. The feature of first party insurance that has received the most explicit attention is the possibility of greater ease in dealing with one's own insurer after an auto accident rather than with another's insurer. But the more significant difference, we submit, concerns the criteria for allocating costs among the insureds; that is, to the setting of insurance premiums fairly among contributors. It is this intramural allocation of premiums that we view as the new central issue of costs posed by contemporary plans.

It may be helpful to reflect for a moment on an old-fashioned and familiar instance of first party insurance — fire insurance on a dwelling-place. The risk that the home-owning insured presents is the risk of his dwelling catching fire — that is, the risk of his being in a position to make a claim against the insurance pool. This risk varies from building to building; the relevant variables include such matters as value of the structure, susceptibility to catching fire, and resistance to the spread of fire. Every fire insurance arrangement takes such factors into account, and everyone understands that fire insurance premiums reflect these variables. It would be regarded as remarkable indeed if fire insurance premiums were homogenized so that each homeowner paid the same total premium for protection of his dwelling from loss by fire.

Is there any difference as we move from fire insurance to the first party insurance component of auto plans? The variables of course are quite different. Moreover, they tend to invite premium differentials that would be impolitic to utilize. To illustrate: key factors would often include the size of the motorist's immediate family — the larger the family, the greater the risk presented to the pool; the seating capacity of the car — the larger the capacity, the greater the risk; the make of the car — the less sturdy the car, the greater the risk; the location in which the car is customarily driven — the more dense the population in the area, the greater the risk; the motorist's age and the ages of those in his immediate family — the younger they are, the greater the risk of economic loss from disabling injury. If these factors combine, as will often be the case, the relatively young motorist, with a large family, living in a concentrated urban area, and driving a lightly constructed car would be called upon by actuarial estimates to pay the highest premium rate. There would no doubt be a marked popular sense that such discrimination is "improper." This feeling of impropriety would in no small part arise from the contrary expectations generated by experience under the existing liability insurance regime

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and others, but simply whether the plan will compel the victim to insure against it or not. In a deeper sense, because of the great overlap in the auto accident world between actors and victims, there is in fact no way to avoid placing the loss on victims as a class by utilizing the route of placing it on actors as a class. In general the only way to share the loss is to go to social insurance via taxation.



for bodily injury, and especially from the fact that this first party insurance is compulsory.

These considerations invite another general observation about contemporary plans. Plans are in most respects silent about the criteria for setting premium rates among motorists. The implication from the silence is that the legislators are happy to leave to the discretion of insurers and insurance commissioners the thorny problems of compelling premium differentials among the first party insureds. The absence of explicit legislative attention to such questions strongly suggests that the answer, when it comes, will lie in the direction of homogenizing risks as much as possible. The result will be to introduce a hidden element of subsidization from one group of motorists to another — with the beneficiaries of the subsidy being by and large the urban, less well-to-do motorists with large families.

Another factor affecting the risks presented by first party insureds is the level of earned income. The higher the level of earned income, the greater the economic loss from injury. If there were no ceiling on awards, there likely would be great pressure on plans to differentiate premiums so as to charge more to high income earners. Without such differentiation, there might be a distributive justice problem — one in which, this time, the less well-to-do contributors would be subsidizing the more well-to-do. A ceiling blunts this problem, but does not altogether eliminate it. There remains at least a modest collision between two objectives of a plan: (i) to handle most auto accident claims by unconditional reparations, the ceiling must be set high; (ii) to avoid the perplexities of distributive justice, the ceiling must be set low. The higher the ceiling, the more likely it will be that many contributors will be *forced* to insure beyond the economic loss they would ever suffer.

#### 14

The intramural allocation of costs fairly among contributors has at least one other source of complication. The criterion for fairness on premium allocation has been taken thus far to be the risk of the contributor claiming against the pool. It was on this basis that we said that a person, for example, with a larger family or a lighter car belonged to a higher risk category. It was also on this basis that we could ignore as irrelevant, for the purposes of fair allocation, the role of the contributor in *causing* accidents. We now examine whether it is proper under all circumstances to ignore this factor.

Let us take up again the situation of one who owns a lightly constructed car. There can be no doubt that viewed as a claimant, he represents to the pool a higher risk of a claim than does the owner of a heavier made car. His position may seem analogous to that, arising under fire insurance, of the owner of a frame house in a neighborhood of brick houses. Likewise, the owner of a heavier made car may seem analogous, for relative risk rating purposes, to the owner of the brick house. But the analogies are misleading. The important difference is that the risk of fire damage to the

frame house is not increased by the fact that the neighboring houses are brick. Most auto accidents involve collisions between cars. The "extra" risk of personal injury to occupants of the light car is largely traceable to the fact that others are driving heavier cars. It must be asked whether this circumstance creates a new equity issue for the allocation of premiums among car owners.

Certainly where insurance is compulsory, it is troublesome to ignore this equity altogether. The effort to acknowledge it, however, leads to an unexpected result. The point that the owner of the light car represents a greater risk to the pool and should therefore pay a higher premium is exactly counter-balanced by another point. The owner of a heavier car creates for the pool a risk that others involved in accidents with his car will make larger claims against the pool. The two risks are reciprocals. The fair allocation of premiums would seem to call for charging neither the owner of the light car nor the owner of the heavier car more. If each pays the same premium, the distinctive risks that each contributes to the pool will, paradoxically, have been taken fully into account.

The most spectacular instance of this reciprocal relationship is presented by the passenger car-heavy truck dichotomy. Statistics show that in car/truck accidents the ratio of personal injury loss is roughly 10/90. For this reason, under the current liability insurance system, truck owners pay substantially higher premium rates than do passenger car owners. If a shift to pure first party ratings were made under a plan, the relative ratings would be reversed. The occupants in a truck are less likely to be hurt seriously in a collision than are the occupants of a car. Again the fair allocation of premiums would call simply for letting these factors offset each other and charging the same premium rate for both trucks and cars. It is difficult indeed to see a justification on any principle relevant to first party insurance for charging the trucks higher rates. Some plans would nonetheless do so.<sup>27</sup> Such a response seems due more to the logic of politics than to the logic of first party insurance.

## 15

There is another component of plans affecting costs and awards. It is the accommodation of the plan to the fact that there are in the society *other* sources of reparation for personal injury accident losses, such as disability coverage under social security, private accident insurance, private medical insurance, workmen's compensation coverage, employment fringe benefits, life insurance, and so on. Today the aggregate reparations furnished by these other sources for personal injury losses from auto accidents (the impact of auto plans apart) probably exceed reparations from the tort system itself in coverage. The relative importance of these other sources has been steadily increasing. In another decade, even without an assist from auto plans, it is likely that these other sources would have taken over

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<sup>27</sup> See UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT § 38, and Comment.

the great bulk of what is now perceived as the auto accident compensation problem. From one perspective, the role of an auto plan is not so much to replace tort law as simply to add one more regime of reparations to complement these other sources. And in the designing of a plan, the relationship between unconditional reparations under the plan and these other sources may present the single most important practical problem.

Accommodating other sources of reparation is, of course, not a new issue for the law. At common law it appears in the form of the collateral source rule. The dominant common law answer, whatever the complexity of the technical profile, is clear: the injured plaintiff can recover both from the tort-feasor and from other available sources. In brief, the presence of other sources is collateral and irrelevant to the setting of tort damages. There are various explanations for what seems at first an unreasonable outcome. As between the plaintiff and the defendant, it would be the greater injustice to give the windfall to the tort-feasor, who had in no sense contributed to financing the collateral source. It is, moreover, counterproductive as deterrence strategy to relieve him of the sanction in full damages. Further, subrogating the collateral source to the tort awards, which would prevent the double recovery, is often not available as a matter of doctrine. And not infrequently, a double recovery is justified as a rough offset against such inadequacies of common law damages as the non-allowance of lawyer's fees. Finally, there would be formidable administrative and practical problems posed if, in order to set damages properly in the tort action, all collateral sources had first to be detected and then measured.

There is no reason for paying any deference to the common law collateral source rule in making unconditional reparations. Fault is no longer relevant; there is no windfall to the defendant and, indeed, there is no "defendant." Perhaps more decisive, a plan that adopted a full collateral source rule would in effect compel people to insure against a loss that is otherwise already covered for them. Even if they would then be allowed double recovery, there are no grounds on principle for *compelling* them to insure the same determinate risk twice.

A plan, unlike the common law, can utilize several routes to avoid double recovery. The plan can readily be made primary to another source. The plan then will always pay first; steps must be taken to ensure that the other source, if double recovery is to be avoided, will deduct the amount of such reparations in computing its obligation to the victim. Such a move may bring both good news and bad news to the other source. It will be relieved of part or all of its obligation, but it will incur new administrative burdens. Presumably it will be called upon to adjust its premiums to reflect the fact that reparations under the auto plan are primary, and it will have to take care to coordinate its payouts in its secondary role.

The major alternative is for the auto plan to be made secondary to another source. Here the situation is reversed; the plan will be called upon to pay only losses left unsatisfied after recourse to the other source.

The administrative burdens will now fall upon the plan to coordinate its payouts and adjust its premiums.

It should be apparent that many combinations are possible, with the auto plan in varying proportions being made primary to some sources and secondary to others. Plans show great variety in the degree of attention paid explicitly to this question of coordinating regimes. The legislation may make the auto plan benefits primary, it may make them secondary, or in some situations it may leave the priority to be determined by contract.

The coordination of regimes has importance not merely for the question of double recovery by the victim, but equally for the question of properly allocating the costs of auto accidents. Under what circumstances, if any, should the unconditional reparations of an auto plan be made the *primary* source (and thus bear a larger share) of reparations for losses falling within the plan? It is not clear that there is a single compelling solution, and to a large extent the matter can only be left to political forces to resolve. There are, however, some factors that might well be taken into account in reaching a solution. Because the plan is the latest upon the scene, it may be easier to tailor the plan than to alter the provisions of existing regimes. There may be a difference between capabilities of the plan and the other regimes for detecting whether other sources are present in the case of a particular claimant. And there may be some force to the notion that the costs of motoring should, insofar as possible, not be externalized, but should be borne by those who have some causal relation to the auto accident.

A special incentive may exist for the auto plan to avoid being the primary source. If the plan were always primary, the necessary premium charges would have to be larger. This discloses a major fact about the situation today. Auto plans have become politically more feasible because there is so vast an amount of reparations already available for auto accidents from other sources. The size of the pool needed for unconditional reparations thus can be substantially smaller, with lower average premium charges as a consequence.

Once it is decided the plan is not to be primary, there is a new twist to the problem of allocating costs among contributors fairly. A new variable is introduced, affecting the relative risk that contributors will make claims against the pool. All, part, or none of the possible claim may, for a given contributor, be offset by other sources. As a risk to the pool, the man with another source of reparation that is primary to the plan is analogous to the man who is a bachelor with no immediate family.

There is an important tension here. Insofar as the plan adjusts rates in order to reflect this differential in risk, its design and administration become more complicated. Insofar as the plan homogenizes differences in risk, its patterns for sharing the burden become unfair. In the extreme case, some participants would be compelled to pay premiums to buy first party insurance on which there is no possibility they can collect reparations.

Because of the combinations of regimes under which a person may come, it often would be wholly impractical to adjust premiums in order to reflect the availability of other primary reparations sources.<sup>28</sup> This may account for why a few plans at times leave open the possibility of recovering both under the plan and from sources not coordinated with the plan. Perhaps the only other practical solution under these circumstances is to offer deductibles in the plan, calling for a corresponding reduction in premiums. To keep the matter simple, these deductibles would be flat dollar amounts, and would not be conditioned on showing that there are in fact other primary sources of reparation.

The upshot is quite remarkable. In the course of solving the problem of integrating and coordinating other reparation regimes with an auto plan, the compulsory aspect of the plan is at least in part erased.<sup>29</sup> And to this degree, out of respect for fairness among contributors, the sumptuary aspirations of a plan have to be sacrificed. In effect, a motorist is given a basis for a preemptory partial opt-out; his reasons for claiming the deductible become irrelevant. Once a plan has gone this far, the fundamental question is again raised: Why should not the first party component be put on a purely voluntary basis?

## 16

It must have been obvious well before this stage of the discussion that virtually all issues we look at in connection with auto plans, whether involving awards or costs, have been directly shaped by the condition that the plans are compulsory. At this point, it will be profitable to explore whether that condition can be relaxed, and what may happen if it is.

Once again we have need for the distinction between contributors and non-contributors. It is one thing to leave it to the motorist's own judgment whether he will take care of himself and his immediate family; it is quite another to leave it to his discretion whether he will take care of someone else's loss. Obviously, he cannot opt-out of the insurance pool for non-contributor victims without increasing the burden on other motorists. If there is to be a plan covering victims who are non-contributors, it must therefore prohibit motorists from opting-out of this segment.

The matter stands quite differently when we consider awards to contributors — that is, the first party insurance aspect of a plan. So long as a motorist contributes his share to cover non-contributor victims, no one else will be affected if he elects to opt-out for himself and immediate family,

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<sup>28</sup> Some college students, who while at school are well covered by other reparation sources, have complained that auto plans may be overcharging for the benefits it will deliver them.

<sup>29</sup> The Uniform Motor Vehicle Accident Reparations Act offers deductibles of \$100, \$300, and \$500 limited to reparations for the insured and his immediate family. The Massachusetts statute, which imposes a ceiling on unconditional reparations of \$2,000 per person, provides for deductibles of \$100, \$250, \$500, \$1,000, or \$2,000 applicable either to the insured alone or to the insured and his immediate family. MASS. ANN. LAWS ch. 90, §§ 34A, 34M (Supp. 1972). Interestingly, the statute thus appears to permit a deductible up to the full amount of the compulsory coverage for the insured and his family.

both as claimant and as contributor. Once he will agree in advance that neither he nor members of his immediate family will, if injured, make a claim against the fund, there is no anomaly in erasing his obligation to the fund. Under the tort system it would be unthinkable to immunize a man from liability for auto accidents upon his promise in advance not to make a claim if he or his family is injured. The contrast reflects the profound difference between the perspectives of first party insurance and those of corrective justice, even as moderated by third party liability insurance.

From a first party insurance perspective, the contribution exacted in the form of premiums from any participant is set to reflect the actuarial estimate of his claim against the insurance fund; if rates are properly set, the participant will in effect have pre-paid his own claim. If he agrees not to make a claim, he erases the need to contribute. No other contributor to the pool is worse off, or better off, as a result of his action. Further, no matter how many motorists elect to opt-out, the feasibility of first party insurance for the remainder is not spoiled — provided that the group remaining in the pool does not become so very small as to thwart actuarial estimates. Under a “third party” perspective, in contrast, the contribution of an individual motorist is set to reflect the likelihood that others will make a claim against the fund as a result of the motorist’s activities. There is little relationship between this likelihood and the likelihood of the motorist himself or his family making a claim against the fund. His promise not to make a claim is irrelevant to his third party obligations so long as he continues to drive a car.

We risk oversimplifying the problem of the contributor opting-out by treating it as if the choice involved only himself. It remains to be seen whether the analysis changes if we now include the fact that the motorist’s choice will often affect not only him, but also members of his immediate family.

There is nothing odd in a man buying, say, health and accident insurance for himself and his family, or in effect “opting-out” by electing not to buy such insurance. We are not disturbed by his power to dispose of the “rights” of others in his family. In the auto compensation version of the problem, however, opting out has a double significance. The motorist cannot simply refuse to buy insurance; he must also be able to waive the rights his family might otherwise enjoy. The family is not merely deprived of unconditional reparations under the plan, but it also may be barred by the plan from utilizing the tort system up to the ceiling level. At first blush such an arrangement seems to raise questions about whether motorists should be allowed to dispose of rights of others without explicit waivers. But on reflection, it makes sense to treat the immediate members of the family — those in a common household — as being, collectively, the first party insurer. As such they have available, in common, the money they would have spent for the first party insurance had the motorist not opted-out. The dichotomy between contributors and non-contributors, although thus complicated, nevertheless survives. In this setting, the functional

definition of a contributor is one on whose behalf the motorist may be permitted to opt-out from the first party insurance component of a plan.

If then it might be practicable to make the first party component wholly voluntary, what explains the strong consensus to keep it compulsory? It is worth restating that the main objective of all high ceiling plans is to substitute the unconditional reparations of the plan for the expensive, erratic, and "unfair" conditional reparations of the tort system. This objective combines, it should be stressed, two aspirations: (1) within limits, to abolish the tort system and (2) to engineer a first party insurance scheme among motorists. The fact is that all plans have combined the two aspirations in a single package.

The question of compulsion makes one aware that these two aspirations of a plan can be viewed as independent of each other. Assume that the one step has been taken and that the tort system has been abolished in auto accidents for losses to motorists and their immediate families, on the ground that it is such a very poor way to manage things. The second step then has to be confronted. For the society that has given up the tort redress, there is a choice in the design of the insurance arrangement: the society can compel insurance or it can give the motorists freedom of choice. Either way there is a challenge. If the compulsion alternative is adopted, the question is why apply the sumptuary principle only to misfortunes involving auto accidents. If the voluntary alternative is adopted, the question is whether there is any achievement in merely abolishing the tort remedy.

It may be tempting to read the almost universal consensus for compulsion as a strong endorsement of the sumptuary principle. An auto plan may be seen as a half loaf of social insurance, which is better than none. But before embracing this conclusion, two other explanations for the consensus should be considered. The decision may reflect nothing more than respect for the practical administrative difficulties that may arise if a compulsory "third party" insurance scheme to protect non-contributors is put in tandem with only a voluntary first party scheme to protect contributors and their immediate families. Or the decision may reflect the realpolitik of the situation. The insurance industry surely would have been monolithically opposed to a proposal that would eliminate the need for the bulk of liability insurance and that did not require first party insurance. And the public rhetoric would have been destroyed if it could be said that all a plan did was to eliminate the tort system from a large part of the auto accident arena.

## 17

We have now completed what we set out to do in exploring the handling of *personal injury* loss arising out of auto accidents. No plan to date has attempted to give unconditional reparations for *damage to the auto itself*. Nevertheless, this issue of how to treat the damage to the auto provides a fruitful occasion for one final examination of the interplay of various points we have been tracing.

At common law there is no need to distinguish the loss attributable to auto damage from the loss attributable to personal injury. They are equally consequences of the auto accident for which redress is sought, and reparation for both losses depends on the same principles and considerations. In numerous cases the damage to the auto is the principal or the sole item of loss from the accident, and the handling of such losses under the fault principle is today a substantial part of common law tort activity.

It is a sociological commonplace that contemporary American society is auto-centered; as cherished property, the auto has come to rival the home. It may seem striking that there is consensus among designers of auto compensation plans that the property loss should not be eligible for unconditional reparations. The consensus has certainly not been the result of an oversight. Property damage has been one of the matters over which plan proponents have struggled most.

It is easy to see why the consensus to exclude auto damage from unconditional reparations has arisen. There is once again the key public rhetoric that adopting a plan will reduce premium charges. If premiums for auto damage were to be added into the compulsory cost of the plan, such rhetoric would be decisively impaired since, plans apart, the dominant fraction of all auto insurance premiums has gone to coverage of autos themselves. There are further a series of considerations that derive from jarring the existing expectations and habits of motorists with respect to insuring against damage to autos. If the plan were to include such damage within its compulsion, this would amount to compelling motorists to carry collision insurance. Surely collision insurance is today accessible and well understood; for years motorists have been making deliberate decisions about whether to carry it. The fact is that a considerable number elect not to carry it, and a large fraction of those who do carry it choose to bear part of the loss themselves by contracting for a deductible in their collision policy. Moreover, there is a widely accepted risk calculus that after an auto has reached a certain age, prudence may dictate becoming a self-insurer for its remaining value. The introduction of compulsory collision insurance thus would seriously upset many existing behavior patterns.

Despite the force of these various practical considerations, it seems likely that the most persuasive reason for excluding auto damage from unconditional reparations has been a point of principle. Everyone becomes uncomfortable about the sumptuary principle when it is applied to the humdrum case of damage to one's own car. How do we state a case for compelling a man, for his own sake, to insure his auto?

There is the anomaly of state intervention to compel protection of an interest in just this one form of property — not homes, not furniture, not color television sets. There is the companion anomaly that the protection compelled is limited to auto loss from a single cause, an auto accident — not loss from theft, fire, or falling objects. Moreover, all plans, as we have seen, employ ceilings beyond which insurance for personal injury loss is not compulsory. If auto damage were to be brought within the plan and



its compulsion, the result would be to treat losses of property values as more deserving of state intervention than human losses reflected in serious personal injuries.

There further would be the detail of whether to have a floor and whether to have a ceiling. Are we to say that any and all damage to an auto calls for application of the sumptuary principle? If not all, which dollars of property loss are the more important? The first \$2,000? All but the first \$200? Or everything in-between?

All of these anomalies converge to suggest there is a deep misfit when sumptuary notions are applied to property loss. In situations where the state does not think particular property so integral to human welfare as to compel the citizen to own it — and the state of course does not require everyone to own and operate an auto — it is utterly illogical for the state to compel him to insure it *if* he does have it. Injury to property seems to differ from injury to person in that it represents only dollar losses. When it comes to compelling insurance, the loss of any one dollar is the same as the loss of any other dollar.

While most plans have accepted the conclusion that auto damage should not be brought within unconditional reparations, stubborn questions about what to do with it persist. One main possibility, and the prevailing solution today, is for the plan to be confined to personal injury loss, otherwise leaving the tort system to handle auto damage losses as it has in the past. The problem will not be quite the same, however, as it was prior to intrusion of the plan. At common law, damage to the auto was frequently a part of the larger loss occasioned by an auto accident; the victim sued for his personal injury loss and for his property damage in the same action. The impact of a plan, particularly a high ceiling plan, necessarily increases the number of situations in which only auto damage is at stake in the tort action.

Does such an outcome undermine any objectives of plans? It will be helpful once again to distinguish between low ceiling and high ceiling plans. The low ceiling plan can more readily accommodate leaving these property loss claims to the tort system. An ostensible goal of such plans is to eliminate the nuisance claim from the tort system. The nuisance value inheres primarily in the personal injury claim where awards for pain and suffering are permitted. Insofar as the claim is for property loss, damages are relatively objective and measurable, and there is, of course, no component of non-economic loss. Another ostensible objective of the low ceiling plan is to handle expeditiously and economically the kind of loss that is most likely to be experienced by the typical citizen. When property loss is left entirely to the vicissitudes of the tort action, this aspiration appears to be frustrated. However, a low ceiling plan, consistent with its objectives, will leave a significant fraction of personal injury claims to the tort system. To the extent that these personal injury claims are accompanied by auto damage claims, there is no problem. Even where the personal injury loss is below the ceiling, the easier processing of such claims will provide a sup-

portive environment which should make settlement of the tort claim for property loss easier.

Leaving auto damage to the tort system appears more awkward for the high ceiling plan. There are two difficulties. First, to a considerable extent, the rationale for such plans has been the asserted imperfections of the fault principle in the auto accident situation; the objective is to substitute a no-fault principle in the large majority of cases. In leaving all property damage to the tort system, the plan is in the awkward position of consigning a substantial part of the auto accident grievance to the mercies of the defective fault principle. Why, to borrow a phrase, should only the man "lucky" enough to have his auto damaged by a negligent driver secure reparation for his loss? Second, it is not possible fully to reach the plan's objective of avoiding the diseconomy of overlap of first party and of third party liability insurance on the same risk by insuring only once. When auto damage is left to the tort system, some duplication of insurance coverage for the same risk will continue where collision insurance and liability insurance for car damage both exist.

Thus either bringing auto damage under unconditional reparations or leaving it under the tort system presents difficulties. The major alternative is to abolish tort liability altogether for auto loss due to accidents — a striking solution which at least one major plan has adopted.<sup>30</sup> Under this alternative, the motorist in effect is being told by the law that if he wishes to protect his car from accident loss, he will have to voluntarily acquire his own first party collision insurance.

This solution certainly has some advantages: it avoids any contradiction as to the fault principle, it implements the objective of cleaning up the tort system, and it reduces greatly the need to carry third party liability insurance. But its difficulties are formidable. Any impression that insurance costs under the plan have been held down would be misleading. The fact is that a new need would be created for carrying first party collision insurance since, in any case, there will now be no other form of redress or reparations. Moreover, because there will no longer be subrogation once the tort system has been eliminated, the relative insurance rates for more expensive or new cars are bound to increase. And by contracting significantly the redress available at common law, the solution runs sharply contrary to the general rhetoric of plans. That rhetoric has always pointed to coverage broader than that available at common law.

There is a further point that cuts more deeply in a common law culture. Insofar as plans reduce awards for personal injuries from auto accidents below what they might have been at common law, there has always been the explicit justification that there is a *quid quo pro*: reparation is made certain rather than left contingent as at common law. The most jarring aspect of eliminating auto damage both from unconditional reparations and from common law redress emerges when compared to the way other

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<sup>30</sup> The Uniform Motor Vehicle Accident Reparations Act adopts this solution.

major changes in tort remedies have been effected. There has been little problem about expanding liability, but there has always been a deep reluctance flatly to erase existing common law rights. The great example has been the intervention of workmen's compensation, which was universally understood as the replacement of common law redress with a reduced but more certain scheme of statutory reparations. Indeed, as we have stressed, the very constitutionality of such legislation depended on the view that it was a "bargain." What is noteworthy about the abolition of tort redress for auto damage is that there is no "bargain" intended: nothing is being offered the motorist in place of his common law rights.<sup>31</sup>

The destruction of these rights seems in a sense gratuitous. Unlike the handling of pain and suffering or excess economic loss, which can be thought of as congruent to the purposes of a plan, the retention (or the abolition) of auto damage redress would seem to have no functional connection with the handling of the personal injury reparation — which after all is the business of the plan. Nothing would be changed on the personal injury side whether or not auto damage is recoverable at common law.

We noted earlier that a strong argument could be made for introducing a modest floor into plans, so that the first dollars of personal injury loss would then be recoverable neither under the unconditional reparations nor at common law. Is it persuasive to view the exclusion of auto damage both from unconditional reparations and from the common law as a floor? The contention would have to be that any auto damage represents a small loss that falls within the logic of a floor. Such an argument will not wash. Some auto damage is far from trivial in amount and may often represent a grievous harm to the owner. More important, the analogy has been put too loosely. If the objective is to avoid cluttering up the law with small claims, the less drastic alternative is simply to impose a specific dollar floor on redress at common law for auto damage arising from accidents. But if this is to be the formula, there can be no good reason for limiting it to claims for property damage in this form only. The point, we repeat, is that one dollar of property damage is the same as any other dollar of property damage.

The elimination of auto damage both from unconditional reparations and from the common law thus suggests again the important and little considered point of common law tort policy: Should there be some *de minimis* threshold before the courts are called upon to administer corrective justice?

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The development of auto compensation plans has not in the last decade been the only game in town as far as reparation for the auto accident goes.

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<sup>31</sup> See *Kluger v. White*, 281 So. 2d 1 (Fla. 1973) (held unconstitutional the Florida statute providing no recovery either under the plan or at common law for auto property damage below \$550).

Over a broad front the common law has continued to work out the implications of its own principles of tort liability and damages.<sup>32</sup> The most spectacular instance of this common law growth has been in products liability. Only slightly less dramatic has been the parallel development in the common law of damages.

Under the emerging law of products liability, the victim of an accident, whether purchaser of the product or pure bystander, can recover against the manufacturer on what is in effect a no-fault basis whenever a shortcoming of the product contributed to the accident or to his injury. When he recovers, moreover, he gets full tort damages. It is not a coincidence that the case which sparked the accelerated development in products liability involved an automobile.<sup>33</sup> There are today a significant number of auto accidents for which reparations may be sought either under a plan or under the doctrine of products liability or under both. These two reparation arrangements invite a series of arresting comparisons.

The auto plan provides a system of both first party and "third party" insurance paid for by motorists on a compulsory basis. It is a widely shared view today that products liability operates in much the same way. Through the workings of the market, the increased costs to the manufacturer due to the enlarged tort liability are passed on to consumers in an increased purchase price for new cars. Since the redress embraces owners, passengers, and bystanders, one can think of this incremental increase in purchase price as analogous to a single insurance premium that buys first party coverage for the owner and his immediate family, and "third party" coverage for all other potential victims. This result has been noted, and praised, as an instance of common law social engineering.

Whatever may be the similarities between auto plans and products liability on the cost side, there are some interesting differences on the award side. In products liability there is no threshold in the form of a deductible or floor; there is no ceiling on economic loss; there are no gaps in recovery for economic loss; there is no deduction for recoveries from collateral sources; there is no disqualification of pain and suffering as compensable loss; and the recovery for neither pain and suffering, or above-ceiling economic loss, or damage to the auto itself is not made contingent upon establishing negligence. All of these differences run in a single direction — that of giving a fuller recovery to the auto accident victim who can bring his injury within the province of products liability.

The force of this disparity is felt if we consider two pedestrians. Pedestrian *A* is struck by an auto negligently driven; the auto was manufactured without a defect. Pedestrian *B* is struck by an auto carefully driven; the auto was manufactured with a defect not attributable to negligence, but

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<sup>32</sup> This is the place to note another oddity in contemporary trends. There has in the past decade been a notable renaissance of writing about fundamental tort theory. What is remarkable is that this burst of intellectual interest should arise at a moment when the domain of tort law is being reduced so dramatically by auto compensation legislation. The tort theory pieces, although imaginative, have managed to pay little attention to this legislative development.

<sup>33</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

that contributes to the accident. Both persons are seriously and equally hurt. Pedestrian *B* recovers every last dollar of his common law damages from the non-negligent manufacturer. Pedestrian *A*'s recovery for the injury caused by the negligent motorist is limited in the several respects that we have already noted.

Products liability doctrine and auto compensation plans reflect strikingly similar yet significantly different contemporary reparation schemes for the auto accident. As Jeremiah Smith observed a half century ago in a somewhat analogous context, both of these schemes cannot be wholly right.<sup>34</sup>

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The underlying theme of this Article has been that auto compensation legislation has been proliferated and elaborated to the point where it is now creating its own jurisprudence. Throughout we have recognized that the auto plan is a new institutional concept. Something new has been brought in to replace something old. At the heart of every plan is the replacement of conditional redress keyed to corrective justice, by unconditional reparations keyed to insurance. One might have thought that a change so conceived would have been able to break sharply with the common law and its legacy of traditions, expectations, and concepts. The most interesting impression with which we are left is that the common law, *even in the case of the most ambitious plans*, still makes its presence felt. Once again Maitland's aphorism is corroborated: auto plans, too, might be said to be ruled from the grave.

On at least three issues the bond is close. The most obvious instance, made explicit in the public rhetoric, is tying the cost of the new arrangement to the cost of the old. Almost universally the baseline for assessing the cost of a plan to the motorist is provided by the cost to him of the common law tort-insurance system. Use of the common law as a baseline is exemplified again in justifying, with respect to non-contributors, the limitations on reparations. This time the reference is not to what the common law costs, but to what the common law affords as redress. The justification may be seen in terms of "a bargain" in which old common law rights are traded for new unconditional reparation rights — a justification which would be without foundation in the absence of any common law rights. Further, we would hazard the guess that it is this same sense of a trade-off of the old for the new which explains why the *compulsion* of the first party insurance component of plans has received so little attention. In general one would not have anticipated that society was so ready to take for granted the propriety of compelling first party insurance. The sumptuary principle, we suggest, was tranquilly accepted in the auto plan instance because

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<sup>34</sup> Smith, *Sequel to Workmen's Compensation Acts* (pts. 1-2) 27 HARV. L. REV. 235, 344 (1913); cf. O'Connell, *Elective No-Fault Liability Insurance for All Kinds of Accidents: A Proposal*, 1973 INS. L.J. 495 (recommending "a plan" for accidents caused by products).

the first party insurance was not viewed as simply first party insurance. It was viewed rather as the replacement of an older system which itself is "compulsory" — that is, the common law liability system, whether or not accompanied by compulsory third party liability insurance.<sup>35</sup>

On at least three other issues it has proved surprisingly difficult to replace the common law with unconditional reparations. While they may in fact reflect nothing more than political diplomacy and compromise, on analysis these survivals of tort law present stubborn difficulties. For varying but overlapping reasons, plans have not attempted to bring within unconditional reparations three aspects of loss: pain and suffering, full economic loss, and auto property damage. In each instance, because the item will not be brought within the plan, there is posed the difficult policy choice of whether to eliminate redress of the particular loss entirely or to allow conditional redress under the tort system. The answer in general has been that it is better to continue to do corrective justice via the tort system than to ignore such items of loss altogether.

On three other issues distinct traces of the common law remain discernible. The designers of plans have been reluctant to carry out fully for all motorists the logic of rating risks for first party insurance. The drastic change in moving from rates set under a third party liability insurance principle to rates set under a first party insurance principle has on occasion involved too sharp a break with expectations. This conflict between old expectations and new logic is seen most dramatically in the efforts under plans to work out the relative rates for trucks and cars. Similarly, traces of common law thinking crop up in the problem of integrating other regimes of reparation with that furnished by the auto plan. Discussion of this whole matter remains almost unintelligible unless placed against the backdrop of the common law collateral source rule. A final example arises with respect to subrogation and reimbursement. It is not uncommon for plans to permit the insurer who initially pays the unconditional reparations to recover from the insurer of a motorist who, judged by the common law criteria of liability, was at fault.

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<sup>35</sup> Several commentators have called attention to the possibility of a "free-choice" auto plan. A motorist would have the limited choice of electing to stay under the common law tort-liability system or electing to come under the plan and its unconditional reparations. Although the proposals vary considerably, one detects an underlying uneasiness as to how a compulsory plan will work with respect to costs, internal economies in administration, deterrence, and public attitudes. Free-choice is suggested as a form of experimentation until more experience and data are available. These proposals are in contrast to the alternatives stated in the text, which would allow a motorist to opt-out of both an auto plan and the tort-insurance system and to handle his auto accident losses as he chooses — either by becoming a self insurer or by purchasing voluntary first party insurance. See Calabresi, *The New York Plan: A Free Choice Modification*, 71 COLUM. L. REV. 267 (1971); cf. Keeton & O'Connell, *Alternative Paths Toward Nonfault Automobile Insurance*, 71 COLUM. L. REV. 241 (1971); O'Connell, *Elective No-Fault Liability Insurance for All Kinds of Accidents: A Proposal*, 1973 INS. L.J. 495.

The origin of free choice strategies would seem to be A. EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM — A VOLUNTARY COMPENSATION PLAN (1954).

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The auto plan and the common law are major alternative arrangements for dealing with accident losses. They are not the only ones. As a last step in this Article, we should like to place both the common law solution and the auto plan solution in a fuller framework.<sup>36</sup>

A by-product of exploring the issues raised by plans has been suddenly to make quite real a question which formerly, if thought of at all, was considered utterly hypothetical. That question is: Why does not the law let accident losses lie where they fall? At common law, the presumptive answer, as Holmes put it, was just that — to let losses lie where they fall *unless* there is a good reason for putting the legal machinery in motion to shift them.<sup>37</sup> The combination of negligence and traditional strict liability principles is generally accepted at common law as a good enough reason for shifting such losses.<sup>38</sup>

The auto plan, especially the high ceiling plan, began with an opposite premise: it is an important social objective to shift personal injury losses off the accident victim. The crucial mechanism for achieving this is seen as compulsory first party insurance.

It is almost startling to discover that a single auto plan may well involve all these answers.<sup>39</sup> It is easy to see that the tort answer and the plan answer coexist whenever there is a ceiling on unconditional reparations and the tort system is continued in existence for redress of losses above that ceiling.<sup>40</sup> It is less easy to see that the plan answer and the let-losses-lie-where-they-fall answer may also coexist. This occurs whenever the plan provides for a deductible, a floor, or a gap.

The more freedom a plan gives for opting-out from unconditional reparations, the more it adopts the solution of letting losses lie where they fall. The situation is not, however, quite as blunt as it sounds.<sup>41</sup> It is an impor-

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<sup>36</sup> A somewhat comparable framework of four basic alternatives is suggested in Kalven, *A Scheme of Alternatives to the Present Auto Accident Tort System*, 1 CONN. L. REV. 33 (1968).

<sup>37</sup> O. HOLMES, THE COMMON LAW 94 (1881).

<sup>38</sup> Negligence at common law never exhausted the possibilities of one-on-one corrective justice. The traditional areas of common law strict liability always suggested other possible approaches. For a recent effort to work out in interesting detail a comprehensive profile of a strict liability corrective justice system see Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUDIES 151 (1973).

<sup>39</sup> The fact that plans involve all three answers suggests two points of considerable generality: in terms of these choices, one can rank the "worthiness" of the loss or the "quality" of the actor's conduct. Some losses may be regarded worthy enough to deserve unconditional reparations; others, less worthy, may be left to the contingencies of tort redress; and still others may be left by the law without reparations. Some conduct may be regarded as bad enough to require tort sanctions; other conduct, less bad, may require sanctions in the form of heavier insurance rates; still other conduct may be treated as non-blameworthy, but may call for contributions to an insurance pool to avoid total externalization of costs; and some conduct, although causing harm, may be ignored by the law altogether. Compare Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

<sup>40</sup> It is noteworthy that some plans have displayed sufficient concern for the tort action, which is preserved for redress above the ceiling on unconditional reparations, to reform it explicitly by adding a comparative negligence provision.

<sup>41</sup> The dominant presence of accessible first party insurance has sometimes been pointed to as the underlying explanation for common law rules denying liability in cer-

tant fact for the auto accident world that there exists an accessible mechanism for shifting the losses off the victim through voluntary insurance.

The difference between letting losses lie where they fall, and a scheme of unconditional reparations narrows when voluntary first party insurance is available. The difference, which remains vital, resides in the compulsion. To make first party insurance compulsory is to compel people to insure for their own good; it is therefore, as we have repeatedly noted, to invoke the sumptuary principle. The reason why auto plans can feasibly employ compulsory first party insurance is because of the large overlap between car owners and their families on the one hand and victims of auto accidents on the other. It is unlikely that this condition can be reproduced in other accident situations. There may thus be a substantial limit on the extent to which the auto plan can be generalized as a solution for other accident problems.<sup>42</sup>

The uniqueness of this overlap between car owners and victims in the auto accident situation provides much of the explanation for why few have been troubled at invoking the sumptuary principle, and the explanation for why, once invoked, it is limited so provincially to the auto accident. Due to this overlap, it is doubtful that the insurance under an auto plan is generally perceived as a use of the sumptuary principle or even as first party insurance.

Many today favor broadening beyond the auto world the social goal of providing unconditional reparations for victims of accidents. It seems most unlikely that efforts to proliferate other ad hoc accident compensation schemes will work.<sup>43</sup>

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tain situations. Thus the general presence of fire insurance has been cited as the basis for the often criticized rule denying recovery to a homeowner whose house burns due to the negligent failure of a water company to supply water pursuant to its contract with the city. *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928); see C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 309-14, 753-63 (2d ed. 1969).

<sup>42</sup> There can be little doubt that the mood of society now favors legal intervention to shift accident losses off individual victims by one means or another. We think it likely that the auto accident has been singled out for legislative action not because auto accident victims have any special appeal as victims, but because of the high visibility of the auto accident problem and especially because of certain structural features of the auto accident world that make it feasible to rely heavily on first party insurance to compensate victims. These features include: the access to licensing as a way of enforcing the compulsory insurance; the existence, albeit in another form, of an insurance pool financed by motorists who are thoroughly accustomed to paying insurance premiums; the large overlap between actors who pay premiums and victims who receive reparations; the appeal of having first party insurance protect the motorist as a victim while erasing his legal obligations to others; and, finally, the ease of tracing the injury to the operation of an auto. The question for the next decade is whether some or all of these features, which seem to be special to the auto world, will prove to be limiting conditions on extending the auto plan strategy to other kinds of accidents.

<sup>43</sup> Both Robert Keeton and Jeffrey O'Connell have recently made attempts to extend the auto plan to other areas. Keeton explored the possibility of extending it to malpractice. Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590 (1973). O'Connell explored the possibilities of extending it quite generally to other accident situations and, ironically, even back to the auto accident itself. His enthusiasm for extending the auto compensation model is an appropriate counterpoise to our hesitations. O'Connell, *Elective No-Fault Liability Insurance for All Kinds of Accidents: A Proposal*, 1973 *INS. L.J.* 495; O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 *VA. L. REV.* 749 (1973).



Serious pursuit of the objective of unconditional reparations brings us to the last basic solution to the accident problem — social insurance. The strict analogue to the auto plan in social insurance would be a government scheme, financed out of tax revenues, furnishing unconditional reparations for all personal injury accident losses, whatever the accident. Such a scheme would be the auto plan writ large.

But even such an arrangement seems a half-way house. If we are to go this far to take care of misfortunes in the form of accidents, why not go the whole way to a social security underwriting of all misfortunes from whatever causes?

The advantage of either of these arrangements as against an auto plan are obvious and great, and provide a social objective which is fully coherent. The disadvantages are equally familiar, obvious, and great. Both arrangements would eliminate the insurance industry, an important component of the private sector, and transfer its functions to the government. More important, both would *externalize* the costs of auto accidents. Taking the losses off those involved in auto accidents and putting these losses on the public generally would sacrifice whatever discipline for economizing accident losses might be contributed by any of the other three basic solutions<sup>44</sup> — by the common law tort system, by the auto accident plan, or by letting losses lie where they fall through eliminating the tort remedy and not replacing it with unconditional reparations.

All solutions to the auto accident problem — and, for that matter, to the accident problem generally — seem to have a price. The key to appraising any auto plan or any comparable proposal covering other accidents, is to locate that price.<sup>45</sup>

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<sup>44</sup> This may be the place to say a word about deterrence. Economists have urged that the chief function of a reparations system is to provide incentives that will serve to alter behavior so as to optimize accident costs in the society. A few years ago some commentators argued that a chief advantage of an auto plan over the common law was the greater possibility under a plan of exploiting a deterrence strategy. This was, as we saw it, the principal point of debate between Guido Calabresi and ourselves. Deterrence as a goal seems to have pretty much dropped out of the discussion today; no one argues on behalf of any plan that it is superior with respect to deterrence.

A great potential for deterrence through plans was thought to lie in the greater ease of achieving proper discriminations in insurance rates. It is not clear to us why such selective rating should be more possible under a plan than under common law and its insurance counterpart. There seems to be nothing in the current burst of plans that advances the matter one way or the other.

The argument over the degree to which the deterrence objective offers criteria for designing reparations systems has not been resolved. But we are disposed to hazard the guess that deterrence strategies cannot, for both practical and political reasons, be executed through setting highly differentiated insurance rates. In the end, the single persuasive point about deterrence may be that it is better to leave accident costs, in some form, on the participants than to externalize them through a social insurance arrangement financed by way of taxation.

<sup>45</sup> An immodest note! Our impulse in undertaking this Article was to work through the analysis of a specific topic — auto compensation legislation as of the present moment. Almost inadvertently we find ourselves reaching issues that must be central for any theory of tort law.

## APPENDIX

## I. Preface

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## VI. Concluding Observations

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